Supreme Court U.S.
FILED
JUN 11 2002
OFFICE OF THE CLERK

Case No. 01-1651

In The

Supreme Court of the United States

SAVE PALISADE FRUITLANDS, a Colorado unincorporated nonprofit association, HARRY C. TALBOTT, GALEN R. WALLACE, and ALLEN M. (MAC) WILLIAMS,

Petitioners,

vs.

MONIKA TODD, in her official capacity as County Clerk of Mesa County, Colorado and BOARD OF COUNTY COMMISSIONERS OF MESA COUNTY,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the citizens of a State violate the Equal Protection clause by reserving the power of initiative to residents of certain political subdivisions, while withholding that power from residents of other political subdivisions of the State.

2. Where the citizens of a State have reserved the power of initiative as to legislative matters, whether the legislature of that State violates the Equal Protection Clause by delegating authority over certain of those legislative matters to county governments, some of which counties are prohibited from allowing ballot initiatives, thereby depriving the residents of those counties of the power of initiative, while that power is freely exercised by residents of other counties.

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Rules

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COMES NOW, Valerie J. Robison, Esq., Assistant Mesa County Attorney, appearing on behalf of Monika Todd, in her official capacity as County Clerk of Mesa County, Colorado ("Todd" herein) and the Board of County Commissioners of Mesa County ("Board" herein) (referred to jointly herein as "County"), and requests that the Supreme Court of the United States deny the Petition for Writ of Certiorari.

I. CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The Petitioners cite the Fourteenth Amendment to the United States Constitution, the Equal Protection Clause, as the basis for their Petition. Also implicated in this case are the provisions of the Constitution for the State of Colorado, Article V, Section 1, Subparagraphs (1) and (9) which provide:

> § 1. General assembly--initiative and referendum
>
> (1) The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject

at the polls any act or item, section, or part of any act of the general assembly.

(9) The initiative and referendum powers reserved to the people by this section are hereby further reserved to the registered electors of every city, town, and municipality as to all local, special, and municipal legislation of every character in or for their respective municipalities. The manner of exercising said powers shall be prescribed by general laws; except that cities, towns, and municipalities may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten percent of the registered electors may be required to order the referendum, nor more than fifteen per cent to propose any measure by the initiative in any city, town, or municipality.

II. STATEMENT OF THE CASE

On November 3, 1999, counsel for the Petitioners wrote a letter to Todd requesting a ballot summary for a land use initiative. *Record - Aplt. App. at 57.* On November 16, 1999, Todd declined the Petitioners' ballot summary request indicating that she could find no authority in statute or state constitution to honor the request. *Record - Aplt. App. at 56.* On November 22, 1999, the Petitioners filed their Complaint in the United

States District Court for the District of Colorado listing Todd as the only Defendant. *Record - Aplt. App. at 7-16.* On December 22, 1999, Todd filed an Answer to the Complaint. *Record - Aplt. App. at 17-25.*

As the case proceeded, the Board was added as a party. *Record - Aplt. App. at 326, Ll. 1-4.* Ultimately, the parties filed cross motions for summary judgment. *Record - Aplt. App. at 26-73 and Supp. Aplee. App. 1-76.* Prior to a ruling, the proceedings were stayed with the consent of the parties by the District Court, pending the outcome of a similar case in the Colorado Court of Appeals: *Dellinger v. Board of County Com'rs for the County of Teller*, 20 P.3d 1234 (Colo.App. 2000) *cert. denied April 9, 2001. Record - Aplt. App. at 32, Ll. 3-6; and see Petition Pg. 46a-54a for case.*

Shortly after the ruling from the Colorado Court of Appeals on the *Dellinger* case, a hearing was held on September 28, 2000. *Record - Aplt. App. at 391-410.* At the hearing the District Court heard oral arguments and reviewed the previously filed briefs. *Record - Aplt. App. at 408, Ll. 18-22.* At the conclusion of the hearing the District Court entered a ruling denying the Motion for Summary Judgment filed by the Petitioners and granting the Motion for Summary Judgment filed by the County. *Id.* A written ruling was entered on September 29, 2000. *Record - Aplt. App. at 235-237.* An appeal to the United States Court of Appeals for the Tenth Circuit followed (hereafter the "Tenth Circuit Appeal").

After filing the Tenth Circuit Appeal, the Petitioners attempted to supplement the record with additional facts. *Record - Aplt. App. at 240-306.* The Motion to Supplement was denied by the United States Court of Appeals for the Tenth Circuit (hereafter the "Tenth Circuit Court of Appeals"). *Record - Addendum 2.* On November 5, 2002, oral argument was held in front of the Tenth Circuit Court of Appeals. A decision affirming the United States District Court for the District of Colorado was issued on February 7, 2002. The Petition for Writ of Certiorari followed.

BACKGROUND

This case arose from the Petitioners' attempts to change the Mesa County Land Development Code (hereafter, "Code") through a ballot measure. In 1996, Mesa County began the process of rewriting its land development code. The original land development code for Mesa County was adopted in 1961 and had been amended and rewritten several times since its inception.

The process of rewriting the Mesa County Land Development Code involved over ninety public meetings held to develop the draft code recommended by the Mesa County Planning Commission (hereafter "Planning Commission") to the Board for adoption. Once the Planning Commission tendered its recommendations to the Board, seven additional public meetings and/or hearings were held before the Board. The Board

also held fourteen public workshops with staff to review and evaluate the public comments and to prepare the final document for adoption.

One particular section of the Code was discussed extensively by the Petitioners in the public hearings and workshops. The section related to simple land divisions[1]. The Petitioners contended that in the East Orchard Mesa area of the County, the minimum lot size resulting from a simple land division should be 10 acres. *Record - Aplt. App. at 59.* Thus, the minimum property size necessary for a simple land division would be 20 acres, rather than the 10 acre minimum contemplated by the Board. In light of the public comments, the Board added a "Note" to the Simple Land Division section (3.5.7) of the Code stating; "An East Orchard Mesa study, due to be completed by March 15, 2000, may result in a change to this section for that particular planning area."

On September 30, 1999, the Planning Commission began meeting with citizens in the East Orchard Mesa area. A total of five meetings with the East Orchard Mesa area citizens were held. The meetings were extremely contentious. Many of the people at the meetings wanted fewer

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[1]A simple land division is an exemption from the subdivision process of the Mesa County Land Development Code which allows a property owner to divide one parcel into two parcels without a public hearing, assuming certain conditions are met.

restrictions on simple land divisions. Others, like the Petitioners, wanted more restrictions.

Prior to the Board's adoption of the rewritten Code, counsel for the Petitioners wrote a letter to Todd on November 3, 1999, requesting a ballot summary for a land use initiative. *Record - Aplt. App. at 57-59.* On November 16, 1999, Todd declined the Petitioners' ballot summary request indicating that she could find no authority in statute or state constitution allowing her to issue the ballot summary. *Record - Aplt. App. at 56.* On November 22, 1999, the Petitioners filed their Complaint in the United States District Court for the District of Colorado. *Record - Aplt. App. at 7-16.*

Also on November 22, 1999, the Board had passed a resolution adopting the Code. The Planning Commission formally recommended to the Board that "no changes be made to the Mesa County Land Development Code for the time being (to give time to see how the new Code works)" following the final meeting on December 2, 1999. On January 13, 2000, the Planning Commission approved the Code adopted by the Board. Following the Planning Commission's approval, one final hearing was held before the Board to receive public comment. On February 28, 2000, the Code was finally and completely adopted by the Board. The "Note" to the Simple Land Division Section remained unchanged. As a result, any simple land division in the East Orchard Mesa

area required a minimum of 10 acres to begin the division of property, rather than the 20 acres desired by the Petitioners.

The Petitioners have claimed an equal protection violation based upon the fact that there are two classifications of counties; statutory counties and home rule counties. Most prevalent are the statutory counties. Statutory counties were created in 1876 with the creation of the Constitution for the State of Colorado. Mesa County was created in 1883. *C.R.S. §30-5-143.* Of the 64 counties in the State of Colorado, 60 are statutory counties, 2 are home rule counties, and 2 are home rule city and counties. A statutory county is a political subdivision of Colorado existing as an arm and agent of the State of Colorado. In 1970, the citizens of Colorado approved a new constitutional provision to the Colorado Constitution providing for home rule counties. *Colo. Const. Article XIV, Section 16.* Home rule county charters are required to contain procedures for initiative and referendum measures. Hence, home rule counties now have the power of initiative and referendum while statutory counties do not.

III. ARGUMENT - REASONS FOR DENYING THE WRIT

Petitioners' request for the issuance of a Writ of Certiorari from this Court should be denied for the following reasons:

A. The Petition for Writ Of Certiorari to the United States Supreme Court does not present a compelling reason for review by this Court under any of the factors enumerated in Sup. Ct. R. 10.

B. The citizens of a State do not violate the Equal Protection clause by reserving the power of initiative to residents of certain political subdivisions, while withholding that power from residents of other political subdivisions of the State.

C. Where the citizens of a State have reserved the power of initiative as to legislative matters, the legislature of that State does not violate the Equal Protection Clause by delegating authority over certain of those legislative matters to county governments, some of which counties are prohibited from allowing ballot initiatives, thereby depriving the residents of those counties of the power of initiative, while that power is freely exercised by residents of other counties.

A. *The Petition for Writ Of Certiorari to the United States Supreme Court does not present a compelling reason for review by this Court under any of the factors enumerated in Sup. Ct. R. 10.*

Pursuant to Supreme Court Rules, cases that present a compelling reason for review may be accepted by this Court for review. *Sup. Ct. R. 10.* Rule 10, defines a compelling reason for review as: (1) a decision has been issued by a United States court of appeals in conflict with another United States court of appeals; (2) a decision has been issued by a United States court of appeals on an important federal question in a way that conflicts with a decision issued by a state court of last resort; (3) there has been a departure from the accepted and usual course of judicial proceedings, or there has there been any sanction of a such a departure, by a United States court of appeals; (4) an important federal question has been decided by a state court of last resort in a way that conflicts with the decision of another state court of last resort; or (5) there is an important question of federal law decided by a United States court of appeals that should be settled by this Court, or there has there been an important federal question decided in a way that conflicts with relevant decisions of this Court. *Id.*

In this case, there has been no conflict between any United States court of appeals. The Tenth Circuit and all other United States court of appeals recognize that the power of referendum and initiative is not a

fundamental right, unless and until the power is vested in the people. In the State of Colorado, the power of initiative has not been vested in the citizens of various political subdivisions of the state, including statutory counties. *See Colo. Const. Article V, Section 1(9).* Likewise, there has been no important federal question that has been decided by a state court of last resort in a way that conflicts with the decision of another state court of last resort. On the contrary, all state courts reviewed agree that the power of initiative and referendum is a reserved power, not a fundamental right. A few of the cases found include: *Kelly v. Macon-Bibb County Board of Elections*, 608 F.Supp. 1036, 1039 & n. 1 (M.D.Ga.1985); *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762 (Wash. 2000); *State ex rel. Stenberg v. Moore*, 602 N.W.2d 465 (Neb. 1999); *State ex rel. Heavey v. Murphy*, 982 P.2d 611 (Wash. 1999); and *Hart v. Secretary of State*, 715 A.2d 165 (Me. 1998).

Furthermore, there has been no decision issued by a United States court of appeals on an important federal question in a way that conflicts with a decision issued by a state court of last resort. On the contrary, the Tenth Circuit Court explicitly upheld the decision of the State of Colorado set out in *Dellinger v. Board of County Commissioners for the County of Teller,* 20 P.3d 1234 (Colo.App. 2000) *cert. denied* No 00SC801 (Colo., April 9, 2001). *Dellinger*, like the Tenth Circuit Court of Appeals, held that the power of initiative had not been reserved to the statutory counties which are political subdivisions of the State of Colorado. *Id. Dellinger* also determined that there was no violation of the Equal Protection Clause

of the U.S. Constitution by the lack of reservation of the initiative power. *Id, at 1238.*

There is no compelling reason for the United State Supreme Court to take jurisdiction of the case since there has been no departure from the accepted and usual course of judicial proceedings, nor has there been any sanction of a such a departure, by a United States court of appeals.

Finally, there is no important question of federal law decided by a United States court of appeals that should be settled by this Court, nor there has there been an important federal question decided in a way that conflicts with relevant decisions of this Court. On the contrary, the question of federal law that is dealt with in the case has already been decided, that being, whether the power of initiative is a fundamental right, or not. In all cases found, the power of initiative is not a right guaranteed by the U.S. Constitution, but rather it is a state-created right. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993); *Kelly v. Macon-Bibb County Board of Elections, supra,* 1039 & n. 1.

B. The citizens of a State do not violate the Equal Protection clause by reserving the power of initiative to residents of certain political subdivisions, while withholding that power from residents of other political subdivisions of the State.

Article V, Section 1(9) was adopted as part of the Colorado Constitution following an election of the people of Colorado passing the Constitutional Amendment in 1910 (hereafter "The Amendment"). Article V, Section 1(1) of the Colorado Constitution provides that the powers of initiative and referendum are reserved to the people on a statewide basis. Under Article V, Section 1(9) of the Colorado Constitution the powers of referendum and initiative are "... further reserved to the registered electors of every city, town, and municipality as to all local, special, and municipal legislation of every character in and for their respective municipalities ..."

On April 9, 2001, the law of the State of Colorado was settled regarding the issue of whether the powers of initiative and referendum had been reserved to the citizens of non-home rule counties. *Dellinger v. Board of County Com'rs for the County of Teller, supra.* The *Dellinger* case stated clearly and finally that the powers of initiative and referendum had not been reserved to the citizens of counties in 1910 by The Amendment.

The powers of referendum and initiative are not rights fundamental to the U.S. Constitution, rather they are a form of direct democracy. *Kelly v. Macon-Bibb County Board of Elections, supra*; *see Grant v. Meyer,* 828 F.2d 1446 (10th Cir. 1987) *aff'd Meyer v. Grant,* 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed. 425 (1988)*; see also L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §13-17 AT 773 (1978).* "Where a state provides for an expression of direct democracy, such as by initiative or referendum, it does so as a matter of legislative grace; the right to participate in such a process is not fundamental to our [federal] Constitution." *Kelly*, 608 F.Supp. at 1039, n. 1.

Any argument by the Petitioners that this is a voting rights case, rather than a power to access the ballot case, is flawed. The U.S. Supreme Court has "repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." *Burdick v. Takushi*, 504 U.S. 428, 438, 112 S.Ct. 2059, 2066, 119 L.Ed.2d 245 (1992); *Munro v. Socialist Workers Party*, 479 U.S. 189, 199, 107 S.Ct. 533, 539-540, 93 L.Ed.2d 499 (1986). There is nothing content based nor politically partisan about the lack of a reservation of the power of initiative and referendum to citizens of statutory counties.

Since there is no "fundamental right" to initiative and referendum, no fundamental right has been violated. As a result, the basis for review in this case would be a rational basis, rather than strict scrutiny as argued by the Petitioners.

The rational basis test applies where no fundamental rights or suspect classification is involved. *Eaton v. Jarvis Products Corp.*, 965 F.2d 922 (10th Cir. 1992); *see also San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). Although the Petitioners do not argue that they are a "suspect classification", it is prudent to examine the issue.

In determining whether a suspect classification is present, consideration must be given to whether the dissimilar treatment is based upon race, sex or other protected grounds. *City of Dallas v. Stanglin*, 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989). In *Kelly v. Macon-Bibb*, 608 F.Supp. 1036, 1039 (M.D.Ga.1985) the Court determined that a "state may not discriminate on the basis of 'suspect' classifications such as race." The Court went on to state: "However, the classifications established by defendants' construction of §12-5-175(a) do not involve such suspect classifications[2]. There being no fundamental constitutional right to call a local referendum, defendants are not required to establish a compelling state interest in support of their construction of the challenged statute." *Id.* at 1039.

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[2]Two classes were treated differently on account of three factors: duration of county residence, age, and whether an individual actually exercised the right to vote in the last general election. *Kelly* 608 F.Supp. at 1039.

As in *Kelly*, no classification here is based on a suspect class such as race, etc. Therefore, a compelling state interest need not be established. Rather, the classification must be "reasonably related to a permissible state interest." *Id.* at 1039.

The rational basis standard is supported by the case law. In *Burdick v. Takushi*, *supra*[3], the Supreme Court addressed whether Hawaii's prohibition on write-in voting unreasonably infringed upon its citizens' rights under both the First and Fourteenth Amendments. The Supreme Court began addressing the issue by stating: "Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold." *Burdick v. Takushi*, 504 U.S. at 432, 112 S.Ct. at 2062-2063. The Court went on to state: "Accordingly, the mere fact that a State's system 'creates barriers ... tending to limit the field of candidates from which voters might choose ... does not of itself compel close scrutiny.'" *Id.* It is clear that even if the issue were as the Petitioners allege, the standard of review would remain the rational basis test. The Tenth Circuit properly applied this standard in its ruling.

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[3]It is acknowledged that *Burdick* deals with an already imposed power of voting. However, the rational is relevant to the issues in this case.

In *Burdick v. Takushi, supra*, the Supreme Court addressed a balancing test to determine whether Hawaii's prohibition on write-in voting unreasonably infringed upon its citizens' rights under both the First and Fourteenth Amendments. The Supreme Court stated:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick v. Takushi*, 504 U.S., at 433-434, 112 S.Ct., at 2063.

The *Burdick* balancing test:

a. The character and magnitude of the asserted injury.

The Petitioners assert that their injury is a denial of their right to access to the local ballot. However, Petitioners, as citizens of a statutory county, have no "right" to access the local ballot on issues concerning land use. In fact, the Petitioners have no federal constitutionally guaranteed "right" to initiative and referendum. *Kelly v. Macon-Bibb County Board of*

Elections, 60 F.Supp. 1036, 1039 & n. 1 (M.D.Ga.1985) and *Grant v. Meyer*, 828 F.2d 1446 (10th Cir. 1987) *aff'd Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed. 425 (1988). Moreover, even if the Petitioners did have a "right" to initiative and referendum, their access is not unconstitutionally limited. Rather, they may seek an initiative on the statewide ballot.

The Petitioners have indicated that this would not be a viable way to pursue the initiative they seek. In support of this position, the Petitioners state [4] the "Colorado Ballot Title Setting Board determined that it did not have jurisdiction to issue a title because the measure was neither 'state legislation' nor an 'amendment to the constitution' within the meaning of the Colorado Constitution Art. V, §1(2), but rather was a purely local matter." *See Petition, p.12.* However, according to the transcript of the Colorado Ballot Title Setting Board ("Title Board" herein), the Petitioners were uninterested in actually determining whether a county issue, in general, could be placed on a statewide ballot. On the contrary, the Petitioners required that their initiative, as written and

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[4]The information concerning the Colorado Title Setting Board was not before the United States District Court Judge. At the appellate level, The Petitioners submitted a Motion to Supplement the Record to the Tenth Circuit Court of Appeals. The Motion was denied. Regardless, the issue continues to be raised by the Petitioners, and therefore, must be addressed by the Respondents.

without adhering to any suggestions given by the legislative council be considered by the Title Board. As a result the Title Board determined that this particular initiative could not meet the jurisdictional requirements of the Title Board.

Irrespective, there is no statutory nor constitutional provision that had been discovered by Mesa County, nor produced by the Petitioners, to indicate that access to the ballot at the state level is prohibited on a limited or local issue. In fact, the opposite is true. A constitutional amendment may be localized on the statewide ballot. Article XVIII, Section 9, of the Colorado Constitution which became effective January 3, 1991, is one such local provision. Under Article XVIII, Section 9, gaming is lawful only in the City of Central, the City of Black Hawk and the City of Cripple Creek.

Petitioners could also obtain the power to place a land use initiative on a local statutory county ballot in two different ways. First, they could seek an amendment to the current Colorado Constitutional provision in Article V, Section 1(9) to include statutory counties. This could be done on the statewide ballot by following the provisions of Article V Section 1(1), or by making such a request of the legislature. Second, they could petition to have Mesa County become a home rule county.

Home rule counties were created pursuant to Article XIV, Section 16 of the Colorado Constitution. Under Article XIV, Section 16, the

people of the State of Colorado approved home rule counties and provided that:

> the registered electors of each county of the state are hereby vested with the power to adopt a home rule charter establishing the organization and structure of county government consistent with this article and *statutes enacted pursuant hereto.* Article 14, Section 16(1), Colorado Constitution. *Emphasis added.*

Various statutory provisions were adopted, including C.R.S. § 30-11-508. C.R.S. § 30-11-508 provides, "Every charter [of a home rule county] shall contain procedures for the initiative and referendum of measures and for the recall of elected officers." C.R.S. § 30-11-508 was enacted in 1971, just after the adoption of Article XIV, Section 16 of the Colorado Constitution on November 3, 1970, and prior to the effective date of the constitutional provision on January 1, 1972. Through the statutory provision enacted pursuant to Article XIV, Section 16(1) (i.e. C.R.S. § 30-11-508), referendum and initiative powers were reserved to the home rule electors by the people of Colorado in the Colorado constitutional amendment of Article XIV, Section 16.

Despite the lack of a specific provision for referendum and initiative powers on local land use issues for statutory counties, the options outlined above provide fairly easy access to the ballot. Consequently, any

burden on access to the ballot is borne only by those who fail to follow the proper procedures. In light of the adequate ballot access afforded under provisions of the Colorado Constitution, the lack of the power for local land use initiatives for statutory counties is only a limited burden.

b. The precise interests put forward as justification for the burden imposed by its rule.

The interest which justifies the burden to the Petitioners is the right of the people of the State of Colorado to determine who and under what circumstances the power of referendum and initiative is reserved. The home rule county "facilitates a broader degree of powers and enhances local autonomy". *Save Palisade Fruitlands v. Todd*, 270 F.3d 1204, 1214 (10th Cir. 2002). However, a statutory county is merely an extension of the state. Colorado has determined time and again that statutory counties have only those powers granted to them.

> A county is not an independent governmental entity existing by reason of any inherent sovereign authority of its residents; rather, it is a political subdivision of the state, existing only for the convenient administration of the state government, created to carry out the will of the state. *(Citation omitted).* As a political subdivision, a county, and its commissioners, possess only such powers as are

> expressly conferred upon them by the constitution and statutes, and such incidental implied powers as are reasonably necessary to carry out such express powers. *Board of County Com'rs of Dolores County v. Love*, 470 P.2d 861, 862-863 (Colo. 1970); *see also State ex rel. Gale Norton v. Board of County Commissioners of Mesa County,* 897 P.2d 788 (Colo. 1995).

Shortly after the opinion in the *Love* case, the people of the State of Colorado passed a referendum allowing the home rule county. *Colorado Constitution, Article XIV, Section 16.* Article XIV, Section 16, which was adopted on November 3, 1970, effective on January 1, 1972, provided for additional powers to the home rule county and its citizens. One such power was prescribed in the accompanying statutory C.R.S. §30-11-508. A home rule county must adopt a charter. A mandatory provision in the charter is the initiative and referendum power for the citizens of the home rule county. C.R.S. §30-11-508.

Unlike a municipality or a home rule county, a statutory county in Colorado is nothing more than an agent of the state in the general administration of the state policy, and its powers are solely at the discretion of the state legislature. A statutory county is not allowed a charter with additional powers not conferred by the state legislature. However, cities, towns, municipalities, and home-rule counties all have charter requirements and rights. Throughout the history of Colorado, the Colorado Supreme Court has consistently ruled that a statutory county and its commissioners, possess only such powers as are expressly conferred

upon them by the constitution and statutes, and such incidental implied powers as are reasonably necessary to carry out such express powers. *Board of County Commissioners of Pitkin County v. Pfeifer, et. al.*, 190 Colo. 275, 546 P.2d 946 (1976); *Board of County Commissioners v. State Board of Social Services*, 186 Colo. 435, 528 P.2d 244 (1974); *Board of County Commissioners v. Love, supra*; *Farnik v. Board of County Commissioners*, 139 Colo. 481, 341 P.2d 467 (1959); *Colburn v. Board of County Commissioners*, 15 Colo. App. 90, 61 P. 241 (1900); *Stermer v. Board of County Commissioners*, 5 Colo.App. 379, 38 P. 839 (1895).

The interest of the people in determining who and under what circumstances the power of referendum and initiative is reserved is ample justification for the treatment of the various Colorado entities. "A legislative classification that does not affect a suspect category or infringe on a fundamental constitutional right 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Donatelli v. Mitchell*, 2 F.3d 508, 515 (3rd Cir. 1993), *citing FCC v. Beach Communications, Inc., 508 U.S. 307, ----, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993).* In *Donatelli*, the court went on to state:

> There is no need to actually articulate the purpose or rationale supporting the classification; nor does the state have any obligation to produce evidence to sustain the rationality of its decision. See *Heller [v. Doe*, 509 U.S. 312, ----, 113 S.Ct. 2637, 2643, 125 L.Ed.2d 257 (1993)]. In short, a classification subject to rational-basis review 'is

accorded a strong presumption of validity.' *Id.*, at ----, 113 S.Ct. at 2642. *Donatelli*, 2 F.3d at 515.

Finally, the U.S. Supreme Court has determined when ruling on the constitutionality of a provision that it is not for the United States Supreme Court to make legislative judgments. *Beauharnais v. Illinois*, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952). Even if the court questions the wisdom of legislation or of its efficacy, the court would not be at liberty to erect those doubts into fundamental law. *Id., 343 U.S. at 266, 72 S.Ct. at 735.*

In the instant case, there is a rational basis supporting the classification that statutory county citizens do not have the power of initiative or referendum. Moreover, the Petitioners' right to equal protection guaranteed under the Fourteenth Amendment to the U.S. Constitution has not been violated by the actions of the Mesa County.

C. Where the citizens of a State have reserved the power of initiative as to legislative matters, the legislature of that State does not violate the Equal Protection Clause by delegating authority over certain of those legislative matters to county governments, some of which counties are prohibited from allowing ballot initiatives, thereby depriving the residents of those counties of the power of initiative, while that power is freely exercised by residents of other counties.

The Petitioners argue that Article V, Section 1(9) of the Colorado Constitution is a violation of the Equal Protection Clause due to the perceived delegation of legislative functions to statutory counties, and the resulting application of Article V, Section 1(9) as applied to statutory counties. An "as applied" challenge is an assertion that a provision, statute or constitutional section, "is unconstitutional as applied to a particular plaintiff's speech activity, even though the statute may be valid as applied to other parties". *Citizens for Responsible Government State Political Action Committee v. Buckley*, 60 F.Supp.2d 1066 (D.Colo 1999). The "as applied" challenge "is subject to a case-by-case analysis to determine whether the statute as applied to the facts of the case abridges the First Amendment." *Id.*; *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 759, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988). Legislative acts, whether citizen initiated or legislatively enacted, are presumed to be constitutional. *Citizens v. Buckley, supra*; *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996); *see also National R.R. Passenger Corp. v. Atchison Topeka and Santa Fe Ry. Co.*, 470 U.S. 451, 105 S.Ct. 1441, 84 L.Ed.2d

432 (1985). "The [p]laintiffs face a 'heavy burden' to show that the statute can never be applied constitutionally." *Citizens v. Buckley*, 60 F.Supp. at 1073; *citing Rust v. Sullivan*, 500 U.S. 173, 183, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991).

Without specifying statutory provisions, the Petitioners challenge Article V, Section 1(9) due to the actions of the Colorado State Legislature in adopting various laws which delegate responsibilities to statutory counties. This is a broad-based challenge to the statutory structure of Colorado law. Irrespective, a statute or constitutional provision is presumed to be constitutional. *Walters v. National Association of Radiation Survivors*, 468 U.S. 1323, 105 S.Ct. 11, 82 L.Ed.2d 908 (1984); *Parham v. Hughes*, 441 U.S. 347, 99 S.Ct. 1742, 60 L.Ed.2d 269 (1979); *Branson School District RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998). In light of the presumption Article V, Section 1(9) of the Colorado Constitution may not be invalidated if there is some "fairly possible" construction that would confirm the constitutionality of the Section. *Branson v. Romer*, 161 F.3d at 636; *See Communications Workers v. Beck*, 487 U.S. 735, 762, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988).

In support of their argument that the delegation of legislative functions has made Colorado Constitution Article V, Section 1(9) violate the equal protection clause of the Fourteenth Amendment, the Petitioners draw the classification for the equal protection argument between statutory counties and home rule counties. However, this classification is flawed. The appropriate classification should be between political subdivisions of the State of Colorado with some sovereign authority, and political

subdivisions of the State of Colorado without sovereign authority. Political subdivisions of the State of Colorado with some sovereign authority include: cities; towns; municipalities; home rule cities; home rule cities and counties; and, home rule counties. Political subdivisions of the State of Colorado without sovereign authority include: statutory counties; school districts; special districts *(e.g.* fire protection districts, metropolitan districts, park and recreation districts, sanitation, water and sanitation, or water districts, tunnel districts); local improvement districts; and, public improvement districts. All political subdivisions of the State of Colorado engage in some legislative functions.

Legislative functions are wide and varied. A legislative function is "[t]he duty to determine legislative policy; [t]he duty to form and determine future rights and duties." BLACK'S LAW DICTIONARY 911 (7th ed. 1999). Legislative functions include: taxation, *Missouri v. Jenkins*, 495 U.S. 33, 110 S.Ct. 1651, 109 L.Ed.2d 717 (1989); the decision to exercise the power of eminent domain, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); budget formulation and contracting, *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 109 S.Ct. 1433, 03 L.Ed.2d 717 (1989); levying of general and special taxes, the directing and controlling of property, and the settling of all claims, *Holder v. Hall,* 512 U.S. 874, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994); and, the ordering of competing social policies, *Sorenson v. Secretary of the Treasury of the United States*, 475 U.S. 851, 106 S.Ct. 1600, 89 L.Ed.2d 855 (1986).

All non-sovereign political subdivisions of the State of Colorado are able to exercise the legislative function of eminent domain: statutory counties *(C.R.S. §30-11-104)*; school districts *(C.R.S. §22-32-111)*; special districts (e.g. fire protection districts, *(C.R.S. §32-1-1002)*, metropolitan districts *(C.R.S. §32-1-1004)*, park and recreation districts *(C.R.S. §32-1-1005)*, sanitation, water and sanitation, or water districts *(C.R.S. §32-1-1006)*, tunnel districts *(C.R.S. §32-1-1008)*); local improvement districts *(C.R.S. §30-20-512)*; and, public improvement districts *(C.R.S. §30-20-512)*. Even prior to 1910, political subdivisions of the State of Colorado without sovereign authority, other than counties, were engaged in the legislative function of eminent domain. In *Kirkwood v. School Dist. No. 7 in Summit County*, 45 Colo. 368, 101 P. 343 (1909), the Summit County School District No. 7 exercised its legislative power through eminent domain. The Court determined that "the question of the location of a school site, and the necessity of taking land therefor, not in excess of one acre, is vested entirely in the school authorities of a district, and the necessities of the district in this respect are not questions for a commission or jury to determine." *Id.*, at 370.

Likewise, counties in Colorado were engaging in legislative functions, such as taxation and settlement of claims. In *Roberts v. People*, 9 Colo. 458, 467, 13 P. 630, 635, (1887), the Colorado Supreme Court stated:

> The county of Arapahoe, like every other organized county in the state, is made by statute a body corporate and politic, and, like other corporations, it can only act by its officers and agents. The board of county commissioners is

> authorized by law to represent the county, and act for it in the settlement of all accounts of receipts and expenses, and in the allowance of accounts chargeable against the county. This board is authorized to issue orders on the county treasurer for the payment of the accounts so allowed and it is made the duty of the latter officer to pay the same out of the county money. *(Citation omitted.)* The board of county commissioners, therefore, is constituted by law the financial representative of the county, to whom all unliquidated claims against the county are to be presented for allowance. No other officer or agent of the county is invested with similar powers; and the presentation of a claim to this board, the allowance of which comes within the scope of its powers, is practically a presentation thereof to the county.

In *Board of Comm'rs of Garfield County v. Leonard*, 3 Colo.App. 576, 580, 34 P. 583, 585 (1893), the Court of Appeals stated that the county commissioners are invested with full and sole power to manage the business affairs of the county. "They are necessarily vested with reasonable discretion in the administration of county affairs."

Finally, it is well established that the exercise by a state of the discretion accorded to it in structuring its internal political subdivisions is subject to judicial review under the Fourteenth Amendment only where that exercise involves the infringement of fundamental rights or the creation of suspect classifications. *Baldwin v. City of Winston-Salem, N.C.*, 710 F.2d 132 (4th Cir. 1983). In this case, there is no fundamental right of initiative and referendum. *Kelly v. Macon-Bibb County Board of Elections, supra*; *see Grant v. Meyer, supra.* The actions of the Colorado

Legislature in adopting various laws which determine the structure of statutory counties does not invalidate the Colorado Constitution. Moreover, the interpretation made by Mesa County and the Colorado Courts that statutory counties do not have the power of initiative and referendum applies to all persons similarly situated. The "fairly possible" construction of Article V, Section 1(9) of the Colorado Constitution is that the power of referendum and initiative was simply not reserved to the citizens of statutory counties by the Colorado people. Thus, Article V, Section 1(9) of the Colorado Constitution has a "fairly possible" construction and is clearly constitutional under the United States Constitution.

IV. CONCLUSION

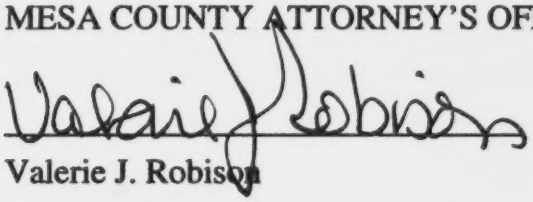
The Petition for Writ Of Certiorari to the United States Supreme Court does not present a compelling reason for review by this Court.

There is no fundamental right to initiative found in the United States Constitution. The fact that the citizens of the State of Colorado did not include counties within purview of Article V, Section 1 of the Colorado Constitution does not violate the Equal Protection clause. Moreover, the Equal Protection Clause does not mandate that the State of Colorado provide the power of initiative to the citizens of all political subdivisions within the State.

Therefore, Mesa County respectfully requests Supreme Court of the United States deny the Petition for Writ of Certiorari.

RESPECTFULLY submitted this 11th day of June, 2002.

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APPENDIX

279 F.3d 1204 **(Cite as: 279 F.3d 1204)**

United States Court of Appeals,
Tenth Circuit.

SAVE PALISADE FRUITLANDS, a Colorado unincorporated nonprofit association;
Harry C. Talbott; Galen R. Wallace; Allen M. (Mac) Williams, Plaintiffs-Appellants,
v.
Monika TODD, in her official capacity as County Clerk of Mesa County, Colorado; Mesa County Board, Defendants-Appellees.

No. 00-1423.

Feb. 7, 2002.

Richard W. Daily, (Stephen K. ErkenBrack, with him on the briefs), Hale Hackstaff Tymkovich & ErkenBrack, L.L.P., Denver, CO, for Appellants.

Valerie J. Robison, Assistant Mesa County Attorney, (M. Lyle Dechant, Mesa County Attorney, with her on the brief), Mesa County Attorney's Office, Grand Junction, CO, for Appellees.

Before TACHA, Chief Judge, GARTH, [FN*] and BRISCOE, Circuit Judges.

FN* The Honorable Leonard I. Garth, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

TACHA, Chief Judge.

Appellants Save Palisade FruitLands and three of its members brought this suit under 42 U.S.C. § 1983, after the Mesa County Clerk, appellee Monika Todd, denied appellants' request to place a land-use proposal on the ballot as a county-wide initiative. Appellants argued that Colorado law, which grants the power to initiate legislation to the electors of home rule counties, but not to those of statutory counties, violates the Equal Protection Clause of the Federal Constitution. The United States District Court for the District of Colorado concluded that there was no denial of equal protection, and it therefore granted Todd's motion for summary judgment. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and AFFIRM.

I. *Background*

A. *The Structure of the Colorado Initiative.*

In 1910, the people of Colorado adopted article V of the Colorado Constitution and reserved the powers of initiative and referendum. *Byrne v. Title Bd.*, 907 P.2d 570, 576 (Colo.1995) (en banc) (Mullarkey, J., dissenting). Article V, subsection 1(2) of the Colorado Constitution provides in part that "[t]he first power hereby reserved by the people is the initiative." Article V, subsection 1(9) further clarifies the scope of this reserved power: "The initiative and referendum powers reserved to the

people by this section are hereby further reserved to the registered electors of every city, town, and municipality as to all local, special, and municipal legislation of every character in or for their respective municipalities."

The Colorado Constitution does not explicitly reserve the right of initiative at the county level. In general, counties in Colorado are simply political subdivisions of the state government that possess only those functions that are granted to them by the constitution or by statute, along with implied powers necessary to carry those functions out. *Pennobscot, Inc. v. Bd. of County Comm'rs,* 642 P.2d 915, 918 (Colo.1982) (en banc); *Dellinger v. Bd. of County Comm'rs,* 20 P.3d 1234, 1237 (Colo.Ct.App.2000). Colorado courts have rejected any argument that the general reservations of power in article V, subsections 1(1) and 1(2) might be construed to grant county governments the power to provide for initiatives. *Dellinger,* 20 P.3d at 1237-38 (considering, and then rejecting, various arguments that would authorize and require counties to provide for initiatives); *see also County Rd. Users Ass'n v. Bd. of County Comm'rs,* 987 P.2d 861, 863 (Colo.Ct.App.1998) (noting in dicta that "the power of initiative and referendum is not generally reserved to the electors as to county governments"), *rev'd on other grounds,* 11 P.3d 432 (Colo.2000) (en banc). [FN1]

FN1. When presented with a question of Colorado law that the Colorado Supreme Court has not resolved, our task is to predict how that court would rule on the issue. *Daitom, Inc. v. Pennwalt Corp.,* 741 F.2d 1569, 1574 (10th Cir.1984). In carrying out this task, "[w]e must also follow any intermediate state court decision unless other authority convinces us that the state supreme court would decide otherwise." *Id.; see also Comm'r v. Estate of Bosch,* 387 U.S. 456, 465, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967).

> Appellants have provided us with no persuasive reason to conclude that the Colorado Supreme Court would reach a decision contrary to *Dellinger*, which we therefore follow as Colorado law.

The constitutional scheme is complicated, however, by statutory grants of the initiative power to the electors of county governments in limited contexts. In some instances, this grant is given to the electors of all counties with respect to specific types of legislation. [FN2] Colorado also distinguishes between statutory counties and home rule counties with respect to the power to initiate general legislation, and this distinction is the central focus of this litigation.

> FN2. For example, electors may initiate legislation regarding county sale and use taxes, and for the creation of public improvement districts. Colo.Rev.Stat. §§ 29-2-104, 30-20-505.

All counties in Colorado are initially created as "statutory" counties. These counties perform basic governmental functions such as managing the property of the county, maintaining streets and street lighting, creating mass transit, and making limited contracts for the fulfillment of these functions. Colo.Rev.Stat. § 30-11-101(1). A statutory county is governed by a board of county commissioners, who are constitutional officers elected in accordance with article 14, section 6 of the Colorado Constitution. The board has several specifically enumerated powers, such as levying taxes and providing for the maintenance of county buildings. Colo.Rev.Stat. § 30-11-107. It also has the power to control the zoning of land not incorporated into cities. Colo.Rev.Stat. § 30-28-102.

However, the Colorado Constitution provides a procedure for "statutory" counties to become "home rule" counties and thereby assume a greater degree of self-government. Colo. Const. art. XIV, § 16. To become a home rule county, a statutory county must adopt a home rule charter, which must be approved by a vote of the electors in the county. *Id.* While statutory counties have government structures that are specifically delineated in the state constitution, home rule counties are largely freed from these constitutional dictates. *Bd. of County Comm'rs v. Andrews*, 687 P.2d 457, 458 (Colo.Ct.App.1984) (noting that article XIV, section 16 frees home rule counties from the provisions of sections 6, 8, 9, 10, 12, and 15 of article XIV of the constitution, which set forth the type of officers who shall be elected in each county and how to choose and compensate them). While a home rule county still "must do the things that all counties must do and must provide the services all counties must provide," *id.*, there are numerous provisions in the Colorado statutes that either allow home rule counties to expand upon the powers already granted to statutory counties or grant home rule counties new powers altogether. For example, home rule counties have broader powers to incur indebtedness than statutory counties have. *Compare* Colo.Rev.Stat. § 30-35-201(6) (specifying procedures for home rule counties to incur general debt), *with* Colo.Rev.Stat. § 30-11- 107(1)(dd) (allowing statutory counties to incur debt to finance energy-saving measures). Home rule counties have the power to provide for "public concerts and entertainments" and may advertise to attract tourists, *id.* § 30-35- 201(3), (4), while statutory counties have no similar powers. These are but examples, and many other differences are apparent from even a cursory comparison of sections 30-35-201 and 30-11-107.

Among these many differences is the scope of the power of initiative. The electors of statutory counties in Colorado may only initiate legislation with respect to a very

limited range of issues. *E.g.*, Colo.Rev.Stat. 29-2-104. Home rule counties, by contrast, are statutorily required to provide for the initiative and referendum of all measures under the same strictures required for statewide ballot measures. Col.Rev.Stat. § 30-11-508. The difference in this grant of powers is what gives rise to this litigation.

B. *Save Palisade FruitLands*

Mesa County, Colorado is a statutory county situated on the border of Colorado and Utah. It contains several cities, including Palisade, Fruita, and the largest city in the county, Grand Junction. It is famous for its fruit production, especially in the eastern areas of the county. Land use in the county is governed by the Mesa County Planning Commission, which adopts land codes governing zoning and the divisibility of property.

Appellant Save Palisade FruitLands ("Save Palisade") is an unincorporated nonprofit association comprised of registered voters in Mesa County. Appellants Harry Talbott and Allen Williams are peach growers, and Galen Wallace is a viticulturist. All three are members of Save Palisade. [FN3] Throughout the 1990s, they and other farmers tried to halt the encroachment of residential subdivisions in Mesa County by attempting to place greater restrictions upon the ability of landowners to subdivide their property. After years of having their efforts rejected, and after several contentious public meetings debating the utility of such measures, Save Palisade and various farmers attempted to place a measure on the Mesa County ballot that would restrict the ability of landowners to subdivide their land. On November 16, 1999, Monika Todd, the Mesa County Clerk, refused to place the

proposed initiative on the ballot. Todd indicated that she could find no authorization for countywide initiatives in a statutory county such as Mesa County.

FN3. For this reason, we will, for simplicity's sake, sometimes refer simply to Save Palisade as the appealing party.

Save Palisade then brought suit against Todd and the Board of County Commissioners of Mesa County in the United States District Court for the District of Colorado. The court granted the defendant's motion for summary judgment shortly after the Colorado Court of Appeals issued its ruling in *Dellinger v. Board of County Commissioners*, 20 P.3d 1234, 1237-38 (Colo.Ct.App.2000), which held that the Colorado Constitution did not authorize the electors of statutory counties to initiate legislation. Save Palisade then sought to have the measure certified as a statewide ballot initiative. On December 6, 2000, the Ballot Title Setting Board determined that the measure was not a "statewide" measure, and it therefore refused to place the initiative on the ballot.

Appellants then brought this appeal, claiming that by granting the power of initiative to the electors of home rule counties but not to those of statutory counties, the Colorado courts denied the electors of statutory counties the equal protection of the laws.

II. *Discussion*

A. *Standard of Review*

We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court. *Wark v. United States*, 269 F.3d

1185, 1187 (10th Cir.2001). Summary judgment is proper only if the evidence, reviewed in the light most favorable to the party opposing the motion, demonstrates that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

B. *The Appropriate Level of Fourteenth Amendment Scrutiny*

Save Palisade argues that Colorado's decision to provide the initiative power to home rule counties but not statutory counties is subject to strict scrutiny under the Fourteenth Amendment's Equal Protection Clause. U.S. Const. amend. XIV, § 1 ("No state shall ... deny to any person within its jurisdiction the equal protection of the laws."). If strict scrutiny applies, Colorado's statute must be narrowly tailored to further a compelling government interest. *Goetz v. Glickman*, 149 F.3d 1131, 1140 (10th Cir.1998). If no heightened scrutiny applies, the statute need only be rationally related to a legitimate government purpose. *Kinnell v. Graves*, 265F.3d 1125, 1128 (10th Cir.2001). We subject governmental classifications to strict scrutiny under the Equal Protection Clause only if they target a suspect class or involve a fundamental right. *Goetz*, 149 F.3d at 1140.

1. *Suspect Class*

When legislation categorizes persons based on suspect classifications, such as race and national origin, we apply strict scrutiny. *Okla. Educ. Ass'n v. Alcoholic Beverage Laws Comm'n*, 889 F.2d 929, 932 (10th Cir.1989). When legislation categorizes persons based on "quasi-suspect" classifications, such as gender and illegitimacy, we apply intermediate scrutiny. *Id.* Finally, when legislation categorizes persons on the basis of a non-suspect classification, we apply rational

basis review. *Id.* In deciding whether to recognize additional classifications as suspect, courts traditionally look to see if the classification is "based on characteristics beyond an individual's control," *id.*, and whether the class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

The classification here is statutory counties, in contrast to home rule counties, and citizens of the two types of counties *are* treated differently in Colorado. Status as a statutory county, however, has not been recognized as a suspect or quasi-suspect classification. Moreover, citizens of statutory counties lack the characteristics of a suspect class. *Id.* Being a statutory county is not a characteristic beyond Mesa County's control, as it can choose to become a home rule county. *Cf. Okla. Educ. Ass'n*, 889 F.2d at 932. Mesa County's citizens are free to work to effect this change. Neither the county nor its citizens claim to suffer disabilities, have a history of unequal treatment, or be politically powerless. *Cf. Rodriguez*, 411 U.S. at 28, 93 S.Ct. 1278. Thus, Save Palisade and its members are not entitled to heightened scrutiny on the basis of a suspect classification.

2. *Fundamental Rights*

Even though citizens of statutory counties are not a suspect class, we will still apply strict scrutiny if the state's classification burdens the exercise of a fundamental right guaranteed by the U.S. Constitution. *Okla. Educ. Ass'n*, 889 F.2d at 932. Save Palisade argues that its inability to bring an initiative in Mesa County burdens its members' fundamental constitutional rights to free speech and to vote.

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336 n. 1, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (acknowledging that free speech is a fundamental right); *Reynolds v. Sims*, 377 U.S. 533, 554, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (acknowledging that the right to vote is a fundamental right).

Here, there are two contexts within which the appellants' rights to free speech and to vote arguably could be implicated. First, it could be argued that the fundamental rights to speech and to vote are implicated within a broader right to bring an initiative, and that the power of initiative is therefore a fundamental right. However, nothing in the language of the Constitution commands direct democracy, and we are aware of no authority supporting this argument. In fact, every decision of which we are aware has held that initiatives are state-created rights and are therefore not guaranteed by the U.S. Constitution. *E.g.*, *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir.1993) (citing *Meyer v. Grant*, 486 U.S. 414, 424, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988)); *Kelly v. Macon-Bibb County Bd. of Elections*, 608 F.Supp. 1036, 1038 & n. 1 (M.D.Ga.1985). We agree with these courts' reasoning and reject this argument.

Second, it may be argued that regulations on the power of initiative violate the fundamental rights to free speech and to vote. It is true that the constitutionally guaranteed rights of free speech and voting may be implicated by attempts to regulate initiative schemes. *See, e.g.*, *Meyer*, 486 U.S. at 424-25, 108 S.Ct. 1886. The mere fact that the state created a right to an initiative process in home rule counties, however, does not require that an initiative process be granted to all political subdivisions or with respect to all subjects. *Skrzypczak v. Kauger*, 92 F.3d 1050, 1053 (10th Cir.1996) ("[Plaintiff's] right to free speech in no way depends on the presence of [her initiative] on the ballot. Moreover, she cites no law, and we

find none, establishing a right to have a particular proposition on the ballot."). In other words, the right to free speech and the right to vote are not implicated by the state's creation of an initiative procedure, but only by the state's attempts to regulate speech associated with an initiative procedure, which is not the case here. [FN4] There is no initiative scheme in place in statutory counties, so there cannot be an unlawful attempt to regulate that scheme.

> FN4. Other courts have agreed with this analysis. In *Kelly*, for example, the plaintiffs brought an equal protection claim, alleging that their right to vote was burdened by procedural restrictions on their right to bring a referendum. 608 F.Supp. 1036. The court rejected this argument, holding that it was "*not* a 'right to vote' case" as plaintiffs asserted, but a referendum case, and that referenda "are not constitutionally compelled." *Id.* at 1038. The court further noted that the Constitution protects the right to vote in a general election, which is part of the right to representative democracy. *Id.* at 1038 n. 1. By contrast, the court stated, initiatives and referenda are expressions of direct democracy that are not guaranteed by the Constitution. *Id.* Thus, alleging a violation of free speech or voting rights does not transform what is essentially an initiative case into a voting rights case, and thereby trigger strict scrutiny. *See also Stone v. City of Prescott*, 173 F.3d 1172, 1175-76 (9th Cir.1999) (finding that the First Amendment is not implicated when the plaintiffs challenge the scope of the referendum right rather than challenging regulations on the exercise of that right).

The cases that Save Palisade cites in support of its argument are inapposite. First, none of these cases involves an equal protection claim. Second, and perhaps most important, all of these cases involve situations where a political subdivision had

already been granted the power of initiative and the state attempted to regulate the speech associated with the initiative process. For example, in the primary First Amendment case cited by appellants, *Meyer v. Grant*, the Court struck down a law banning payments to petition circulators. Unlike the instant case, however, *Meyer* involved a situation where the state had already granted electors the power of initiative. 486 U.S. at 424, 108 S.Ct. 1886. Moreover, the *Meyer* Court struck down the law not because of anything unique to an initiative scheme, but rather because it limited the number of messengers available to spread core political speech. *Id.* at 422- 23, 108 S.Ct. 1886.

The other free speech case cited by Save Palisade, *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999), is likewise distinguishable. There, the Court held that a state's requirement that circulators of initiative petitions wear name badges infringed upon the circulators' rights to anonymous free speech. *Id.* at 199-200, 119 S.Ct. 636. Like *Meyer*, *Buckley* involved an unconstitutional regulation of speech that happened to occur in the context of an existing initiative scheme.

Meyer and *Buckley* thus establish that, "where the people reserve the initiative or referendum power, the exercise of that power is protected by the First Amendment." *Stone*, 173 F.3d at 1175 (9th Cir.1999); *see also Austin*, 994 F.2d at 296-97 ("Unlike the challenged provisions in *Meyer*, Michigan's initiative system does not restrict the means that the plaintiffs can use to advocate their proposal."). They do *not* establish that when the power of initiative is created for one political subdivision, it must necessarily be created for all political subdivisions. [FN5] The Colorado Court of Appeals determined in *Dellinger* that the citizens of Colorado have not reserved the power of the initiative as to statutory counties, and that

statutory counties therefore do not have the power of initiative. Because we are unpersuaded that the Colorado Supreme Court would disagree, we follow the *Dellinger* court's determination of state law. *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967); *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1574 (10th Cir.1984). [FN6] Because there is no petition process being regulated, and because there is no federal right to have such a process created, we find that the *Meyer* and *Buckley* analysis provides no basis for strict scrutiny.

FN5. It is worth noting the potentially broad remedy that petitioners seek. If we are required to apply strict scrutiny to Colorado's decision to grant the electors of statutory counties the power of initiative, then presumably we would be forced to apply the same level of scrutiny to school boards, fire districts, administrative agencies, and a host of other decision-making bodies whose decisions cannot, under the present scheme, be changed by direct democracy. We decline to make a ruling with such far- reaching implications.

FN6. Appellants repeatedly advance the proposition that Colorado's gradual delegation of legislative powers to counties represents an attempt to constrict the people's reserved powers in the constitution. In appellants' view, the increased role of county government effectively has resulted in the deprivation of citizens' right to initiate legislation on issues that previously would have been handled at the state level, and as such, would have been subject to the initiative.

The Colorado Court of Appeals addressed and rejected this precise argument in *Dellinger*, 20 P.3d 1234, 1237-38 (Colo.App.2000), and appellants' argument has not persuaded us that the Colorado Supreme Court

would rule otherwise. Appellants do not explicitly argue that the scope of the initiative process may not be constricted once granted without violating the federal Constitution. As such, we leave the alleged constriction of the right to initiative to state courts.

Nor are the "right-to-vote" cases cited by petitioner any more persuasive. These cases establish conclusively that " the right to vote in an election is protected by the United States Constitution against dilution or debasement.' " *Hellebust v. Brownback*, 42 F.3d 1331, 1333 (10th Cir.1994) (quoting *Hadley v. Junior College Dist.*, 397 U.S. 50, 54, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970)). They do not establish that every political subdivision must decide questions in the exact same manner. *Reynolds v. Sims*, the first case cited by appellants, dealt with a situation where legislative districts were apportioned with grossly disproportionate numbers of voters in each district. 377 U.S. 533, 537-53, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). As a result, individual voters in districts with small numbers of citizens effectively had disproportionate representation in the state House and Senate as compared to voters in districts with large numbers of voters. *See also Gray v. Sanders*, 372 U.S. 368, 379-80, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) (invalidating Georgia primary scheme where candidates were selected under a "county unit" system that effectively weighted rural votes more heavily than urban votes). The other case cited by appellants, *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000), involved a situation where ballots for a statewide post from different counties were recounted under disparate standards, raising the possibility that voters who cast identical ballots would have their votes treated differently when choosing electors for president. *Id.* at 106-09, 121 S.Ct. 525.

Both of the cases Save Palisade cites thus involve situations where two or more classes of voters cast votes on the same issue or for the same office, and one class's votes were effectively diluted. That is simply not the case here. While voters in home rule counties may have the ability to vote directly on county-wide measures affecting their own county--an ability not shared by their statutory county analogues--this in no way dilutes the votes of the electors of statutory counties. The reason is simple: Unlike the voters in ***Bush*** and in ***Reynolds,*** the voters in statutory and home rule counties never have their votes weighed differently on the same question. A statewide ballot is the only opportunity for true comparison. When that occurs, all voters, whether they reside in statutory or in home rule counties, are given an opportunity to vote. We can find no burden on a fundamental right to vote under such a scheme.

Like the appellant in ***Skrzypczak v. Kauger,*** Save Palisade and its members are still free to express their view that Mesa County's land use process needs to be changed, and they have thus suffered no burden on their right to free speech. 92 F.3d 1050, 1053 (10th Cir.1996) ("[T]he Oklahoma Supreme Court has not prevented Skrzypczak from speaking on any subject. She is free to argue against legalized abortion, to contend that pre-submission content review of initiative petitions is unconstitutional, or to speak publicly on any other issue."). Nor have their rights to vote been diluted with respect to any other citizens of Colorado. Therefore, no fundamental right has been burdened.

C. *Rational Basis Review*

Having decided that the category created by Colorado infringes upon no *federal* fundamental right, [FN7] and having found no suspect classification, we evaluate

Colorado's allocation of the power of initiative under minimal scrutiny. Under this standard, the classification need only bear a "rational relation to some legitimate end to satisfy the Equal Protection Clause." *Kinnell v. Graves*, 265 F.3d 1125, 1128 (10th Cir.2001) (quoting *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996)). We examine the statute to ensure that the state has sufficiently "treat[ed] like cases alike," and we will not act to keep a state from "treat[ing] unlike cases accordingly." *Crider v. Bd. of County Comm'rs*, 246 F.3d 1285, 1288 (2001) (quoting *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 532 (10th Cir.1998)).

> FN7. We would again reiterate that any potential right to an initiative is created at the state level only and does not involve a federal right. Colorado courts have clearly stated that this right does not exist at the statutory county level, *see supra,* and we accept that construction of the Colorado Constitution. Any complaint that a state right has somehow been diluted or that the Colorado Court of Appeals has "re-written the Colorado constitution" must be directed to the Colorado Supreme Court.

Appellants ask us to compare apples and oranges when comparing home rule and statutory counties. As noted at the outset of this opinion, home rule counties have a broader range of powers than statutory counties. Moreover, home rule counties were created in order to give citizens of unincorporated areas a greater degree of autonomy in local affairs than they previously enjoyed. Both of these ends--facilitating a broader degree of powers and enhancing local autonomy--are legitimate government purposes. Granting the power of initiative to home rule counties and not statutory counties could advance both of these ends, and is therefore rationally related to either purpose.

It appears from a single mention in appellants' brief that the citizens of Logan County voted to place term limits on its Board of Commissioners. This does not change our analysis. One isolated, unchallenged incident in which the electors of one statutory county enacted legislation by an initiative does not give rise to an equal protection violation. We also cannot help but observe that the Logan County initiative was voted on in 1998, at least two years before the Colorado Court of Appeals' decision in ***Dellinger.*** Thus, at the time of the Logan County initiative, there was no controlling legal authority that clearly forbade statutory counties from enacting legislation through an initiative process. Absent evidence that such initiatives are still occurring in some statutory counties in the face of what is now clear legal authority from the Colorado Court of Appeals, we refuse to find that Colorado is enforcing its laws in an arbitrary or irrational manner in violation of the Equal Protection Clause.

III. *Conclusion*

Appellants are still not without recourse. They can attempt to change the Colorado statute to grant the power of initiatives to statutory counties. They can attempt to have Mesa County adopt a home rule charter, thereby ensuring the right to initiate legislation. However, for the reasons stated above, the Equal Protection Clause of the Fourteenth Amendment does not command Colorado to grant the power of initiative to the electors of statutory counties simply because it has granted that power to the electors of home rule counties. The district court properly granted summary judgment to appellees, and its decision is therefore AFFIRMED.

20 P.3d 1234, 2000 CJ C.A.R. 5381
(Cite as: 20 P.3d 1234)

Colorado Court of Appeals, Div. V.

Daniel G. DELLINGER and Committee for Growth Limits, an unincorporated association, Plaintiffs-Appellants,

v.

BOARD OF COUNTY COMMISSIONERS FOR the COUNTY OF TELLER and Connie Joiner as
Clerk and Recorder for Teller County, Defendants-Appellees.

No. 99CA0403.

Sept. 14, 2000.
Certiorari Denied April 9, 2001.

Isaacson, Rosenbaum, Woods & Levy, P.C., Edward T. Ramey, Denver, Colorado; J. Gregory Walta, P.C., J. Gregory Walta, Colorado Springs, Colorado; American Civil Liberties Union Foundation of Colorado, Mark Silverstein, Denver, Colorado, for Plaintiffs-Appellants.

Sparks Willson Borges Brandt & Johnson, P.C., Christopher M. Brandt, Stephen A. Hess, Colorado Springs, Colorado, for Defendants-Appellees.

Opinion by Judge KAPELKE.

In this action for declaratory and injunctive relief, plaintiffs, Daniel G. Dellinger and Committee for Growth Limits, appeal from the summary judgment entered in favor of defendants, Board of County Commissioners for the County of Teller (Board) and Connie Joiner, Clerk and Recorder for Teller County (Clerk and Recorder). The primary issue on appeal is whether the right of initiative set forth in Colo. Const. art. V, § 1, is applicable to, and exercisable by, the electors of unincorporated, non-home-rule counties in Colorado. We agree with the trial court that it is not and, therefore, affirm.

The facts are essentially undisputed. Plaintiffs, purporting to act pursuant to § 30-11-103.5, C.R.S.2000, sought to place, by petition of the electors of Teller County (the County), a citizen initiative on the ballot in the County for the November 1998 general election. The proposed initiative would require the County to "place a one percent limit on the annual increase in new residential dwelling units in unincorporated associations."

Plaintiffs' petition did not contain the number of signatures required by Colo. Const. art. V, § 2 for a state-wide initiative.

Although the Clerk and Recorder deemed the initiative sufficient for purposes of § 30-11-103.5, she nevertheless referred the matter to the Board. Reasoning that the constitutional right of initiative did not extend to non- home-rule counties except in certain statutorily defined contexts, the Board refused to allow the initiative to appear on the ballot and directed the Clerk and Recorder to withhold it from the ballot.

Plaintiffs then filed this action, seeking entry of a temporary restraining order and a preliminary injunction to compel the Board to place the initiative on the ballot. In their motion, plaintiffs argued, as pertinent here, that the Board's refusal to place the initiative on the ballot violated the right of initiative reserved exclusively to the People by Colo. Const. art. V, § 1. The court denied the motion.

Plaintiffs filed an appeal in this court and an emergency motion for mandatory injunction, which was denied. Thereafter, they filed in the supreme court an emergency petition for writ in the nature of mandamus and injunction pursuant to C.A.R. 21. The supreme court denied the petition. The appeal in this court was dismissed upon plaintiffs' motion.

Later, the parties filed cross-motions for summary judgment in the trial court. In defendants' motion, they argued that the right to initiative under Colo. Const. art. V, § 1, was reserved "at the statewide, and also at the city, municipal or town level, but *not* at the county level." Plaintiffs in their motion asserted that the defendants' actions had been in derogation of plaintiffs' constitutionally reserved right of initiative under Colo. Const. art. V, § 1, and thus violated their constitutional rights of free expression, due process, and equal protection under the United States and Colorado Constitutions.

The court entered summary judgment in favor of defendants, finding that there was no federal constitutional right of initiative at the state or local level, that the Colorado Constitution did not confer a right of initiative at the county level, and that plaintiffs' constitutional rights had thus not been violated. This appeal followed.

I.

Plaintiffs contend that the right and power of initiative as reserved to the People pursuant to Colo. Const. art. V, § 1, are applicable to and exercisable by the electors of unincorporated, non-home-rule counties in Colorado. We disagree.

Colo. Const. art. V, § 1 provides, in pertinent part:

(1) The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.

(2) *The first power hereby reserved by the people is the initiative, and signatures by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election shall be required to propose any measure by petition,* and every such petition shall include the full text of the measure so proposed. Initiative petitions for state legislation and amendments to the constitution, in such form as may be prescribed pursuant to law, shall be addressed to and filed with the secretary of state at least three months before the general election at which they are to be voted upon.

....

(9) The initiative and referendum powers reserved to the people by this section are hereby further reserved to the registered electors of every *city, town, and*

municipality as to all local, special, and municipal legislation of every character in or for their respective municipalities. The manner of exercising said powers shall be prescribed by general laws; except that cities, towns, and municipalities may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. (emphasis added)

In *County Road Users Ass'n v. Board of County Commissioners*, 987 P.2d 861, 863 (Colo.App.1998), a division of this court stated that "the powers of initiative and referendum are not generally reserved to the electors as to county governments." While we agree with plaintiffs that the division's comment in that case was dictum, we nevertheless find it to be an accurate statement of the law.

In construing the Constitution, we must give terms their ordinary and popular meaning. *Bolt v. Arapahoe County School District No. Six*, 898 P.2d 525 (Colo.1995). Further, where the language of the Constitution is plain and its meaning clear, the language must be enforced as written. *Colorado Ass'n of Public Employees v. Lamm*, 677 P.2d 1350 (Colo.1984).

Here, there is no reference to counties in Colo. Const. art. V, § 1(1) & (2). Further, as plaintiffs acknowledge: "Nowhere--and particularly nowhere in the 'further' reservation of the initiative power from local governments in Article V, section 1(9)--is there a specific reference to counties." Plaintiffs also recognize that: "Section 1(9) should *not* be read to include counties, as such a reading would violate both the plain language and historical realities that existed at the time Section 1(9) was adopted."

Each of these sections was adopted in 1910, at a time when, as plaintiffs point out, county governments did not exercise legislative functions to any significant extent, if at all. Thus, plaintiffs do not argue that the drafters or those who adopted these constitutional provisions actually contemplated that the initiative and referendum processes would extend to legislative issues at the county level, as such.

Nevertheless, plaintiffs argue that, in light of "the historical evolution of the role and function of county governments in Colorado since 1910," we should interpret Colo. Const. art. V, § 1, as including a right on the part of electors to initiatives on a county-wide basis. We are not persuaded.

A county is a political subdivision of the state, not an independent governmental entity existing by reason of any inherent sovereign authority of its residents. Accordingly, a county possesses only such powers as are expressly conferred by the constitution and statutes, and such incidental implied powers as are reasonably necessary to carry out such powers. *Board of County Commissioners v. Love*, 172 Colo. 121, 470 P.2d 861 (1970); *see also Pennobscot, Inc. v. Board of County Commissioners*, 642 P.2d 915 (Colo.1982).

As noted, the rights of initiative and referendum are not generally reserved to the electors as to county governments. Colo. Const. art. V, § 1(1), (2), and (3) grant legislative power to the General Assembly with a reservation to the People of the powers of initiative and referendum. These reserved powers are further reserved to the registered electors of every city, town, and municipality as to all local, special, and municipal legislation. Colo. Const. art. V, § 1(9). They are not, however, expressly reserved to the electors of counties, as such.

By statute, though, electors of counties have been granted rights of initiative on a county-wide basis in certain limited contexts. Section 29- 2-104, C.R.S.2000, for example, provides for the proposal by initiative of county-wide sales tax ordinances. Also, § 30-11-508, C.R.S.2000, requires that the charters of home-rule counties contain procedures for the "initiative and referendum of measures." No statutory authorization exists, however, as to county-wide initiatives for electors in non-home-rule counties. Nor is there any statute specifically authorizing initiatives at the county level such as that proposed here concerning housing growth limits.

Thus, plaintiffs' contention is not supported by the constitutional provisions, by their underlying historical intent, or by any statutory authority.

Essentially, plaintiffs are arguing that we should interpret Colo. Const. art. V, § 1, to authorize initiatives at the county level because the adopters of the initiative provisions would have intended to do so had they known or envisioned that county governments would later exercise significant legislative authority and functions.

We recognize that the power of initiative "is a fundamental right at the very core of our republican form of government." *McKee v. City of Louisville*, 200 Colo. 525, 616 P.2d 969 (1980). As the trial court found here, however, each Colorado elector does in fact possess that right, albeit at the state level, pursuant to Colo. Const. art. V, § 1(1) and (2).

Plaintiffs urge that, because county governments today are exercising a legislative function, as subordinate agencies of the state they could only have acquired that power by devolution from the General Assembly. That devolution or delegation

could not, they assert, be free of the right of initiative reserved to the People under Colo. Const. art. V, § 1.

The argument has a certain ring of logic. Nevertheless, given the absence of support in the language or historical intent of this constitutional provision, we must reject plaintiffs' contention.

We cannot ignore the fact that the provisions of Colo. Const. V, § 1(1), (2), and (9) expressly authorize initiatives at the state and municipal level, but do not do so at the county level. Nor can we ignore the fact that the General Assembly has seen fit to provide for county-wide initiatives only with respect to home-rule counties or as to specific, defined subjects such as the adoption of sales tax ordinances. In our view, to interpret Colo. Const. art. V., § 1 as conferring a general right of initiative at the county level would require a rewriting of that provision. This, of course, we are not free to do. *Pace Membership Warehouse v. Axelson*, 938 P.2d 504 (1997).

We therefore agree with the trial court's conclusion that there is no constitutional right of initiative for electors at the county level.

In light of our disposition of this issue, we need not address plaintiffs' contention that the procedures in § 30-11-103.5 would govern their proposed initiative.

II.

Plaintiffs also contend that the right of initiative as created and defined by the Colorado Constitution implicates liberty interests that are entitled to the procedural guarantees of the Due Process Clause of the Fourteenth Amendment. We disagree.

Plaintiffs rely on *Montero v. Meyer*, 13 F.3d 1444 (10th Cir.1994) as supportin their contention. *Montero*, however, is inapposite. That action arose from a initiated amendment to the Colorado Constitution designating English as Colorado official language. The amendment had been initiated pursuant to Colo. Const. ar V,§ 1(1) & (2), which reserves to the People the power to propose and ena amendments to the constitution.

Here, as concluded above, there is no constitutional provision extending the powe of initiative to the electors on a county-wide basis. Further, we note that the cou in *Montero* rejected the argument that the Colorado Constitution and Colorad statutes governing the ballot initiative created in the plaintiffs there a liberty intere within the meaning of the Fourteenth Amendment. *See also Committee for Bette Health Care v. Meyer*, 830 P.2d 884 (fn.7) (Colo.1992) ("[T]here is no federa constitutional right to the initiative process").

Accordingly, we perceive no error.

The judgment is affirmed.

Judge ROTHENBERG and Judge CASEBOLT concur.